Supreme Court, U.S.
FILED
MAR 31 1997
OFFICE OF THE CLERK

NO. 96-1381

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1996

CONSTRUCTION INDUSTRY TRAINING COUNCIL OF WASHINGTON, a Washington non-profit corporation,

Petitioner,

v.

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL; PAINTERS DISTRICT COUNCIL NO. 5; PUGET SOUND ELECTRICAL APPRENTICESHIP AND TRAINING TRUST; SEATTLE AREA PLUMBING AND PIPEFITTING INDUSTRY JOURNEYMAN AND APPRENTICE TRAINING COMMITTEE; SNO-KING SHEET METAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE; WASHINGTON STATE APPRENTICESHIP AND TRAINING COUNCIL,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

**LYNN D.W. HENDRICKSON*
Assistant Attorney General
900 Fourth Avenue, Ste. 2000
Seattle, Washington 98164-1012
(206) 464-6219

**Counsel of Record for Washington State Apprenticeship and Training Council*

19 pp

QUESTIONS PRESENTED

1. Did the Washington Supreme Court err in refusing to apply preemption under the Employee Retirement Income Security Act to state-mandated benefits, which were the basis for determining that state approval of apprenticeship training programs constituted a "license" under the state's administrative procedures act.

2. Does the Employee Retirement Income Security Act preempt the Washington Supreme Court's imposition of an additional requirement of an adjudicative hearing outside the standards of the National Apprenticeship Act and its authority granted by the federal Bureau of Apprenticeship and Training in implementing the National Apprenticeship Act.

3. Does the Washington Supreme Court's granting of standing to competitors of apprenticeship training programs and creation of a requirement that an adjudicative hearing be held prior to approving such programs, interfere with the effective nationwide application of the National Apprenticeship Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

I. COUNTERSTATEMENT OF THE CASE

A. Introduction 1

B. Facts 2

C. Procedural History 3

II. SUMMARY OF ARGUMENT 5

III. ARGUMENT

A. The Federal Claims Of ERISA Preemption Of "State Mandated Benefits" Were Not Properly Presented To The Washington Supreme Court 6

B. The Issue Of ERISA Preemption Of State Administrative Procedures Was Never Raised To The Washington Supreme Court . . 11

C. The Issue Of Federal Preemption, Based Upon The Provisions Of The Fitzgerald Act, Was Never Raised To The Washington Supreme Court 12

IV. CONCLUSION 13

TABLE OF AUTHORITIES

CASES *Page*

Adams v. Robertson,
___ U.S. ___, 117 S.Ct. 1028,
1997 WL 85127 (U.S. Ala.)(1997) 6

Board of Directors of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537, 550, 107 S.Ct. 1940, 1948,
95 L.Ed.2d 474 (1987) 6, 11, 12

Clark v. Jeter,
486 U.S. 456, 459-60, 108 S.Ct. 1910, 1913,
100 L.Ed.2d 465 (1988) 6

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,
___ U.S. ___, 117 S.Ct. 832, (1997) 10

Dillingham Construction, N.A., Inc. v. California Division of Labor Standards Enforcement,
57 F.3d 712 (9th Cir. 1995), *overruled*,
___ U.S. ___, 117 S.Ct. 832, (1997) . . 9, 10,13

Gade v. National Solid Wastes Management Ass'n,
505 U.S. 88 (1992) 11

Mackey v. Lanier Collection Agency & Service, Inc.,
486 U.S. 825 (1988) 12

Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council,
129 Wn.2d 787, 799, 820 P.2d 581 (1996) . . 4

CASES (cont.) *Page*

Webb v. Webb,
451 U.S. 493, 501, 101 S.Ct. 1889, 1894,
68 L.Ed.2d 392 (1981) 11

FEDERAL STATUTES

National Apprenticeship Act ("Fitzgerald Act")
29 U.S.C. § 50-50b (1996) 12

Employee Retirement Income Security Act of 1974,
Pub. L. No. 93-406, 88 Stat. 829
(codified as amended at 29 U.S.C.
§§ 1001-1461 (1996) . . . . . *passim*

28 U.S.C. § 1257 (1996) 5, 6

STATE STATUTES

WASH. REV. CODE 19.28.610 (1996) 7

WASH. REV. CODE 34.05 (1996) 3, 11

WASH. REV. CODE 34.05.010 (1996) 7

WASH. REV. CODE 34.05.570(1)(d) (1996) 4

WASH. REV. CODE § 39.12.021 (1996) . . . . . *passim*

WASH. REV. CODE § 49.04 (1996) 1

STATE STATUTES (cont.) *Page*

WASH. REV. CODE § 49.04.030 (1996) 1

WASH. REV. CODE § 49.04.040 (1996) 1

WASH. REV. CODE § 51.12.130 (1996) 7

WASH. ADMIN. CODE 296-04-040 (1995) 1

WASH. ADMIN. CODE 296-04-005 (1995) 1

I. COUNTERSTATEMENT OF THE CASE

A. Introduction

The Respondent, Washington State Apprenticeship and Training Council (Council), is the agency responsible for matters concerning apprenticeship and training in Washington. The Legislature created the Council in 1941 and empowered it to establish standards for apprenticeship agreements. *See* WASH. REV. CODE § 49.04 (1996).

Pursuant to its legislative mandate, the Council adopted rules that; govern its own procedures, identify basic standards and expectations regarding the activities of those who submit applications to the Council, and provide ongoing oversight of apprenticeship program standards, revisions, and dispute resolutions. *See* WASH. ADMIN. CODE 296-04 (1995).

The principle function of the Council is to approve and register apprenticeship and training agreements that are in the best interest of the apprentice and conform to established standards. WASH. REV. CODE § 49.04.030 (1996); WASH. REV. CODE § 49.04.040 (1996); WASH. ADMIN. CODE § 296-04-005 (1995).

The approval of apprenticeship programs must take place at regularly-scheduled quarterly meetings of the Council which are open to the general public. WASH. ADMIN. CODE § 296-04-040(1) (1995). Proposed standards are voted on by the Council and approved, disapproved, or approved subject to enumerated changes. WASH. ADMIN. CODE § 296-04-005 (1995).

B. Facts

In December 1993, the Petitioner, Construction Industry Training Council of Washington (CITC) submitted an application to be the sponsor of an apprenticeship program involving six separate trades - construction electrician, carpenter, painter-decorator, plumber, sheet metal worker, and heating/air conditioning installer and servicer.

During the April 1994 quarterly Council meeting there was public comment and Council discussion of the proposed standards. Members of the Council and the audience, including Respondent, Seattle-King County Building and Construction Trades Council (SBT) members, raised concerns about program specifics and adequacy. Many of the concerns were addressed by CITC during the discussion. On April 22, 1994, the Council voted on the proposed standards and, by a vote of 4 - 2, approved the standards subject to four enumerated changes. Ernest L. Huntley, Acting Secretary of the Council, by letter dated June 28, 1994, informed CITC that he had reviewed the conditions placed on the proposed standards and that CITC had satisfied the changes, and that they could begin indenturing apprentices as of that date.[1]

---

[1] **Petitioner asserts that "[t]hereafter numerous contractors joined CITC so that they could participate in CITC's apprenticeship training programs and competitively bid on and perform public works contracts." Petition for Writ of Certiorari, p.6. There is no evidence in the record for this assertion. S.Ct. Rule 15.2.**

C. Procedural History

SBT filed two separate Petitions for Review, pursuant to the state Administrative Procedures Act (state APA), WASH. REV. CODE § 34.05 (1996), one at the time of the Council's tentative approval of CITC, and the other when CITC was notified that it had satisfied the four enumerated changes and began indenturing apprentices. In both petitions, SBT alleged that the Council's approval activity qualified as a licensing function, and that it violated the APA because its approval of CITC's standards with enumerated changes was conducted without an adjudicative proceeding. The parties agreed to the consolidation of the two petitions for review.

Initially, the trial court agreed with SBT in an oral ruling, issued on March 21, 1995, that the Council needed to perform an adjudicative function. CITC intervened. CITC and Council filed motions for reconsideration. The trial court granted the motions and issued an order that dismissed SBT's petition.

SBT then filed a Notice of Appeal to the Washington Supreme Court. The court granted direct review and substantive briefs were submitted.[2] Later the court requested supplemental briefing on the issue of the possible effect of the Employment Retirement Income Security Act, (ERISA), on Washington's apprenticeship agreement registration scheme on the distinction made in

---

[2] CITC asserted in its brief that "[t]he CITC program at issue have been approved by the federal Department of Labor's Bureau of Apprenticeship and Training." Intervenor-Appellee Responsive Brief, p. 11. SBT objected and appropriately noted that "the matter is not a matter of record and should not be considered by the court." Appellants' Reply Brief, p. 8.

WASH. REV. CODE § 39.12.021 (1996) between registered and unregistered apprenticeship agreements with respect to wages paid apprentice workers on public works projects.

A unanimous Court issued a decision on August 8, 1996 which did not address the merits of the Council's action, but rather whether provisions of the state APA applied and required that an adjudicative hearing be held on an application for approval of an apprenticeship program. *Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council*, 129 Wn.2d 787, 799, 820 P.2d 581 (1996). The Court held that SBT has standing to seek review of the Council's approval and registration of CITC's apprenticeship program. 129 W.2d at 804. Further the state APA requires a "formal adjudicatory hearing" on an application for Council approval and registration of an apprenticeship program. *Id.* The trial court decision was reversed and the Council's approval of CITC's program was set aside and the matter was remanded for a formal adjudicatory hearing under the APA. *Id.*

CITC timely filed a Motion for Reconsideration which asked the Court to reconsider only that portion of the August 8, 1996 opinion granting relief based on the absence of a separate and distinct ruling by the Court on the element of "substantial prejudice" as required by WASH. REV. CODE § 34.05.570(1)(d) (1996). CITC, Respondent/Intervenor's Motion For Reconsideration Or, In The Alternative, An Interlocutory Order, p. 1. CITC requested an interlocutory order allowing state approval of the CITC training program to stand pending the prompt adjudicative hearing required by the Court's August 8, 1996 opinion. *Id.* On November 1, 1996, the Washington Supreme Court denied the motion for reconsideration and issued a Mandate effective that date.

II. SUMMARY OF ARGUMENT

The Petitioner failed to raise or properly present the federal claims before the Washington Supreme Court that it now seeks direct review of pursuant to the provisions of 28 U.S.C. § 1257 (1996).

The limited discussion of the impact of possible ERISA preemption focuses on an effort to minimize the claimed benefit of state approval of apprenticeship rather than apprise the state court of the alleged preemptive effect of the statute on the court's ability to interpret the state Administrative Procedures Act.

The Washington State Administrative Procedures Act, is a law of general application which does not refer to, single out, or subject ERISA plans to different treatment. The law applies to all persons who meet the definition of "party" for the purpose of participating in an agency proceeding or seeking judicial review or civil enforcement of final agency action regardless of whether a benefits provided by a plan subject to ERISA is at issue.

Petitioner failed to timely raise the issue of federal preemption based the National Apprenticeship Act, commonly known as the Fitzgerald Act. That Act is cooperative in design, not coercive.

III. ARGUMENT

A. The Federal Claims Of ERISA Preemption Of "State Mandated Benefits" Were Not Properly Presented To The Washington Supreme Court

The power of the Supreme Court to review the judgment of the highest court of a state is set forth in 28 U.S.C. § 1257 (1996). On review of that judgement, this Court will consider only the federal question raised, provided it had been properly brought before the state court. It will not decide federal claims that were not "pressed or passed upon" below. *Clark v. Jeter*, 486 U.S. 456, 459-60, 108 S.Ct. 1910, 1913, 100 L.Ed.2d 465 (1988); *citing Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80, 108 S.Ct. 1645, ----, 100 L.Ed.2d 62 (1988). On March 3, 1997, this Court stressed the jurisdictional importance of proper preservation of federal claims when it dismissed an "improvidently granted" certiorari because the federal constitutional issue was never presented to the Alabama Supreme Court. *Adams v. Robertson*, ___ U.S. ___, 117 S.Ct. 1028, 1997 WL 85127 (U.S. Ala.)(1997).

"[T]he record as a whole [must show] either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987). *citing Webb v. Webb*, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 1891-1892, 68 L.Ed.2d 392 (1981). The record in this matter does not reflect the adequate presentation of the federal claims upon which review is sought.

The federal claims of ERISA preemption of "state mandated benefits" were not properly presented to the Washington Supreme Court. Petitioners allege that three collateral state statutes relied upon by the Washington Supreme Court to arrive at its definition of "license" under WASH. REV. CODE § 34.05.010 (1996) are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq*. (1996). WASH. REV. CODE § 39.12.021 (1996) permits the payment of lower apprentice wage rates on public works contracts. WASH. REV. CODE § 51.12.130 (1996) provides that while an apprentice attends supplemental and related instruction courses all workers compensation premiums are paid by the State Apprenticeship Council WASH. REV. CODE § 19.28.610 (1996) provides that apprentices registered in approved apprenticeship programs can engage in certain electrical utility work without holding an electrician certificate.

When one examines the context of the ERISA preemption argument it is readily apparent that the Washington Supreme Court was not apprised of the current assertion that any or all of the state-mandated benefits sufficiently "relate to" an ERISA plan so as to trigger the preemption provision and adversely impact the Court's review of the state APA.

The first mention of ERISA preemption appears in CITC's Responsive Brief when it predicts "the most significant benefit, the ability to pay Council approved apprentices lower wages, will soon be available without Council approval." Intervenor-Respondent Responsive Brief, p. 11. On May 1, 1996 the Washington Supreme Court Clerk, C.J. Merritt sent a letter to the parties informing them that "[t]he court has concluded than an issue not fully briefed may warrant further consideration."

> The issue is the possible effect of the Employment Retirement Income Security Act, 29 U.S.C. § 1101 [sic], et. seq., on Washington's apprenticeship agreement registration scheme, and specifically on the distinction made in RCW 39.12.021 between registered and unregistered apprenticeship agreements with respect to wages paid apprentice workers on public works projects. The parties should limit their written arguments to that issue and how it should affect the court's decision in this case.

Id.

All parties timely filed responsive briefs. CITC argued that preemption analysis was "not directly germane" because the trial court did not rely upon the analysis[3] and concluded

> RCW 39.12.021 is preempted under controlling law and, as a result, the primary benefit of registering an apprenticeship training program with the State of Washington is now gone. Even if there is no preemption, registration of apprenticeship training programs does not constitute a "license." Therefore, no requirement for an adjudicative hearing exists.

CITC, Supplemental Brief of Intervenor-Respondent, pp 6-7. The appellants, Seattle Building Trades, concluded that:

---

[3] CITC, Supplemental Brief of Intervenor-Respondent, p. 5.

> the administrative law and standing issues in the case do not turn on Dillingham [57 F.3d 712 (9th Cir. 1995)]. If the Court later determines that the status of RCW 39.12.021 is important, the Court should withhold decision until the U.S. Supreme Court definitively resolves the issue.

SBT, Building Trades Supplemental Memorandum Regarding Preemption Issue, p. 4-5. The Council offered the following analysis:

> [f]urther developments in the area of ERISA pre-emption analysis will obviously impact the substantive areas of wage and apprenticeship law. However, the Council's process for approving voluntarily submitted apprenticeship program applications will continue to be governed by the Washington Administrative Procedure Act. Existing statutory analysis in the briefs that have been submitted to this court allow for resolution of this appeal prior to and independent of any pending federal litigation.

Council, Supplemental Brief of Respondent, p. 6.

No substantive argument or questioning from the court on the issue of ERISA preemption occurred during oral argument. At no time, did any party assert that the workers' compensation or electrical licensing provisions were preempted by ERISA.

The court succinctly addressed the ERISA preemption issue in a footnote in its decision.

> Whether ultimately the Court's decision in *Dillingham* invalidates or even affects RCW 39.12.021 remains to be seen. Our decision in this case does not depend upon the validity of that statute, as it is not the only statute conditioning coverage on Apprenticeship Council approval of an apprenticeship program.

129 Wn.2d 787, 800 n.2, 920 P.2d 581, n.2 (1996). The court's decision accurately reflected the limited nature of the ERISA preemption argument before it.

The focus of the Petitioner's argument, now, is that Washington's prevailing wage statute sufficiently "relates to" an ERISA plan so to invoke the provision which broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"[4] covered by ERISA. This Court, in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, (1997), considered and rejected this argument as it was applied to a similar California prevailing wage statute.

> The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned -- 'reporting, disclosure, fiduciary responsibility, and the like." *(citations omitted)*.

117 S.Ct., at 840.

---

[4] 29 U.S.C. § 1144(a).

There is no evidence in the record that identifies CITC's programs as covered employee welfare benefit plans protected by ERISA. This Court has not been provided with the necessary information to undertake a substantive review of CITC's apprentice training program.

B. The Issue Of ERISA Preemption Of State Administrative Procedures Was Never Raised To The Washington Supreme Court

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987). The aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981). The issue of ERISA preemption of state administrative procedures was never raised to the Washington Supreme Court.

The Washington State Administrative Procedures Act, WASH. REV. CODE § 34.05 (1996), is a law of general application which does not refer to, single out, or subject ERISA plans to different treatment.[5] The law applies to all persons who meet the definition of "party" for

---

[5] A law of "general applicability" is one applicable to a broader class than that at issue in a particular case. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), involved preemption under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* The Court noted that, in that context, non-occupational safety laws which affected workers, such as traffic safety laws or fire safety laws, were laws of general applicability. *Id.* at 107.

the purpose of participating in an agency proceeding or seeking judicial review or civil enforcement of final agency action regardless of whether a benefits provided by a plan subject to ERISA is at issue.

In *Mackey v. Lanier Collection Agency & Service, Inc.*, this Court reviewed and considered both the Georgia antigarnishment provision and Georgia's general garnishment statute. The general garnishment statute was not preempted by ERISA as it did not single out or specially mention ERISA plans of any kind. It was a "procedural" mechanism for the enforcement of judgments. It created no substantive causes of action, no new bases for relief, or any grounds for recovery. 486 U.S. 825, 834 n.10, 108 S.Ct. 2182, 2188 n.10, 100 L.Ed.2d 836 (1988).

C. The Issue Of Federal Preemption, Based Upon The Provisions Of The Fitzgerald Act, Was Never Raised To The Washington Supreme Court.

As previously noted, the failure of the highest state court to address a federal issue creates a presumption that the issue was not properly presented. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte, supra.* The record reflects that Seattle Building Trades only made a historical reference to the National Apprenticeship Act ("Fitzgerald Act") 29 U.S.C. § 50-50b (1996) and CITC made an erroneous one.[6] The substantive issue of federal preemption by the Fitzgerald Act was never raised to the state court.

---

[6] Appellants' Opening Brief, p. 27. CITC mistakenly cited to the Fitzgerald Act as the statutory authority for "the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A. § 50 et seq. [sic]". CITC, Intervenor-Appellee's Responsive Brief, p. 12.

The purpose of the Fitzgerald Act is to protect "apprentices through the establishment of minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards." *Joint Apprenticeship and Training Council of Local 363 v. New York State Dep't. of Labor*, 984 F.2d 589, 591 (2d Cir. 1993) (*citing* 29 U.S.C. § 50-50b (1988 & Supp. III 1992) and statements of Representative Fitzgerald in the Congressional Record). The mechanisms utilized are cooperative not coercive. The provisions of the Fitzgerald Act do not preempt state apprentice regulations.

III. CONCLUSION

Failure to present or properly preserve important federal questions removes this case from direct review. In light of *Dillingham* there are no compelling reasons to address in this case. The Court should deny the Petition for Writ of Certiorari.

DATED this 31th day of March, 1997.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

**LYNN D.W. HENDRICKSON*
Assistant Attorney General
900 Fourth Avenue, Ste. 2000
Seattle, Washington 98164-1012
(206) 464-6219

**Counsel of Record - Wash. State Apprenticeship and Training Council*